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77-1066 and 78-156

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CHARLES BONANNO, JR.,

*Petitioner*

*v.*

STATES OF AMERICA

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STATES OF AMERICA,

*Petitioner*

*v.*

WGH J. ADDONIZIO

---

STATES OF AMERICA,

*Petitioner*

*v.*

LAN and THOMAS M. FLAHERTY

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orari to the United States Courts of  
the Ninth and Third Circuits

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Hearings on H. R. 1598 and Identical Bills before the  
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ministration of Justice, House of Representatives, 94th

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

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Nos. 77-1665 and 78-156

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JOSEPH CHARLES BONANNO, JR.,

*Petitioner*

v.

UNITED STATES OF AMERICA

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UNITED STATES OF AMERICA,

*Petitioner*

v.

HUGH J. ADDONIZIO

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UNITED STATES OF AMERICA

## **ion Presented**

g Court had jurisdiction pursuant  
5 motion to vacate and correct a  
ere the import of that sentence,  
, has been changed to defendant's  
lly revised parole decisionmaking  
adopted, published and imple-  
ntencing and prior to defendant's  
e.

## **statement**

### **Procedural Background of Hugh J. Addonizio**

ntenced in September 1970 to a  
years pursuant to Title 18 U.S.C.  
ary fine in the amount of \$25,000.  
for parole on July 3, 1975 after  
of his term. On June 2, 1975, an  
ing was conducted by two hearing  
the hearing, the hearing officers  
zio what he had been previously  
ad work supervisor at the mi-

the hearing officers, Mr. Addonizio was advised that the officers declined to rule on his parole application and that the matter was being referred to the Regional Office of the Parole Board in Philadelphia. Thereafter, Mr. Addonizio was advised that the Regional Board had further declined to make a ruling and the application had been sent to the National Board in Washington. On July 8, 1975, three members of the National Board in Washington denied Mr. Addonizio's application and set January 1, 1977 as his next eligibility date (A. 38-39). The reasons given for the denial were:

“After careful consideration of all relevant factors and information presented, it is found that a decision outside the guidelines at this consideration appears warranted because the offense was part of a large scale or organized criminal conspiracy. Further, the offense behavior consisted of multiple separate offenses.” (A. 13)

After the denial of his parole application, Mr. Addonizio was advised that a designation of “special offender” on his file had made the salient factor quotient and the Parole Board guidelines inapplicable to his case (A. 39)<sup>1</sup>. He had previously been advised that the same designation had resulted in denial to him of certain privileges which other

As a result, Mr. Addonizio filed a petition for habeas corpus in the jurisdiction of incarceration seeking the removal of the "special offender" designation based upon *Catalano v. United States*, 383 F. Supp. 346 (D. Ct. 1974). On May 3, 1976, the District Court for the Middle District of Pennsylvania ordered the "special offender" designation removed from Mr. Addonizio's records. At the same time the court found that the designation had not resulted in the denial of parole; but rather, that parole had been denied based upon the Board's evaluation of Mr. Addonizio's offense. The court further permitted Mr. Addonizio to be classified as a "central monitoring case" in accordance with new Parole Board procedures. *U.S. Ex Rel. Addonizio v. Arnold*, 423 F. Supp. 189 (M.D. Pa. 1976)

On December 8, 1976, a second institutional hearing was held by two hearing officers of the Parole Commission. This hearing was an extremely short one. The hearing officers did not question Mr. Addonizio or have any discussion with him in an effort to evaluate his progress and rehabilitation or his prospects for successful reintegration into society in the event parole was granted. They now advised him that they had no authority to grant his application since he was designated a "central monitoring case". They further told him that with him it was not a question

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ent's 28 U.S.C. §22  
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<sup>3</sup> By that time *Koren v. United States* (1976) and *U. S. v. Korn* (1976), 542 F.2d 628, 630, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 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Mr. Addonizio had served five years and his ten year sentence. The court, based upon of the Third Circuit cases of *United States v. Addonizio*, 537 F. 2d 1005, rehearing denied, 542 F. 2d 628 (1976), and *United States v. Somers*, 552 F. 2d 108 (1976), found it had jurisdiction under 28 U.S.C. § 1291. Its reasonable intention and expectations at sentencing had been frustrated by the new policy making standards and procedures adopted in sentencing.

Mr. Addonizio was a first offender. At the time of his conviction he had been serving his second term as a member of the City Council of the City of Newark. Prior thereto he had an unblemished record of public service, including having served as a member of Congress and had been a highly decorated World War II veteran. Mr. Addonizio was 64 years old at the time of sentencing and is now 64 (A. 5).

The court specifically stated that it had considered the severity of respondent's crime, the harsh ten year sentence and had expected him to receive "a meaningful parole hearing—the court's original intention based on his institutional record and his present condition."

cedures not in existence and not contemplated at  
of sentence.<sup>5</sup>

donizio was released from prison on April 28,  
uant to the District Court's order of the preced-  
He was reincarcerated pending appeal on May 3,  
order of the Third Circuit and then re-released  
2, 1977 by order of this Court.

not forming the basis of the District Court's finding of  
and ruling, the District Court added that it felt "the  
ocial conscience" demanded its ruling. In a footnote, the  
ed out that one of Mr. Addonizio's co-defendants, who  
ecisely the same sentence as Mr. Addonizio, was released  
n March 1976, after having served four years—slightly  
one-third of his ten year sentence (78-156 Pet. App. 32a).  
noted further that a second co-defendant, also with the  
ce was released on parole in early April 1976 (A. 41-43).  
the District Court was undoubtedly mindful of the fact  
original fifteen defendants named in the indictment, only  
ed on trial as of the close of the government's case.

The Third Circuit was presented with a series of cases including the instant case, and *Geraghty v. U.S. Parole Commission*, 579 F. 2d 238 (3rd Cir. 1978) which required it to make a thorough and careful analysis of parole decisionmaking practice and procedure before and after the 1972-3 changes and the PCRA. As a result the Third Circuit developed a full understanding of the fundamental nature of the change and its adverse impact on certain defendants sentenced prior to 1972-3. It is this understanding which led to the proper determination, entirely consistent with current case law, of the need for, and availability of, a remedy under §2255.

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mates for their exemplary behavior. The underlying philosophy of parole is an administrative mechanism to mitigate the sentencing process and to extend "as will" as consistent with the safety of

The amendments to the Parole Law made in the 1950's demonstrate clearly the intention that parole decisionmaking be based on the requirements of rehabilitation and the third amendment was to assure that decisions would be made at appropriate times for judging rehabilitation.

In 1951, then Section 4202 of Title I of the Federal Crime Control Act was amended to permit, among other things, parole after serving a term or terms of over 180 days instead of 1 year as originally provided by Section 4202. At the time of the amendment, the intent of the amendment was to correct the anomaly that a prisoner sentenced or convicted of a felony for which he could be sentenced to less than 1 year could be released on parole after serving less than 1 year while a prisoner sentenced to a year or more had to serve the entire year less good time, or about ten months, before being released. In this issue, Senate Report No. 524 contains

*degree of rehabilitation that would warrant the parole of a prisoner.* (Emphasis added) 1951 U.S. Code Cong. Service, pages 1676-1677.

A letter attached to the report from the Justice Department recommending passage of the amendment states:

"There have been numerous cases of prisoners who have learned their lesson, have made an outstanding response to the prison rehabilitation program, and would, in all probability have made good law abiding citizens if released at the proper time, but, as a result of the delay in effecting their release until one-third of their sentences had been served became poor parole risks at the time their eligibility date arrived." Id. at 1678.

In 1958 in its discussions of what became Title 18 U.S.C. 4208(a)(1) and 4208(a)(2), [now 4205(b)(1) and b(2)], which permitted consideration for parole prior to the one-third point of the sentence, it is again clear that Congress was operating under the assumption that decisions to grant parole would be based upon the Board's assessment of rehabilitation as gleaned from institutional performance.<sup>12</sup>

belief that institutional record  
sm would determine release on

ed, the Court wrote:

prisoners and the Parole Board  
basic premise that prisoners  
tody are to be rehabilitated and  
lives as soon as in the Board's  
sition can be safely made. This  
ngress intends."

\* \* \*

Parole Board's interest and its  
ease a prisoner as soon as he is  
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vision as long as he is a good  
d, 318 F. 2d 225, 237, 242 (D.C.

uit wrote:

tencing procedure in the federal  
describing a number of years of  
rally means that the defendant  
approximately one-third of this

While in 1970, as today, there were three major sentencing alternatives available to the courts,<sup>13</sup> the choice of sentencing alternative affected only the timing of eligibility for parole and not the criteria used in the decision making process. *Tedder v. Bd. of Parole*, 527 F. 2d 593, 594 (9th Cir. 1975); *United States v. McBride*, 560 F. 2d 7, 9-10 (1st Cir. 1977); *Dioguardi v. United States*, 587 F. 2d 572 (2nd Cir. 1978); *Ruip v. United States*, 555 F. 2d 1331 (6th Cir. 1977); *Geraghty v. United States Parole Commission*, 579 F. 2d 238 (3rd Cir. 1978).

The only statutory provision in 1970 dealing with the criteria used in parole decisionmaking was 18 U.S.C. 4203 which provided:

"If it appears to the Board of Parole from a report by the proper institutional officers or upon application by a prisoner eligible for release on parole, that there is a reasonable probability that such prisoner will live and remain at liberty without violating the laws, and if in the opinion of the Board such release is not incompatible with the welfare of society, the Board may in its discretion authorize the release of such prisoner on parole."

Section 4202 of Title 18, dealing with a sentence of a

in which he is confined, may be released on parole after serving one-third of such term or terms or after serving fifteen years of a life sentence or of a sentence of over forty-five years."

**B. Subsequent to the imposition of Mr. Addonizio's sentence there was a radical change in the criteria applied in parole decisionmaking.**

The criteria used in parole decisionmaking were radically changed first by the Parole Board in 1972-73 and then confirmed by the enactment of the Parole Commission and Reorganization Act of 1976. The present §4206 (a) of Title 18 provides:

*"If an eligible prisoner has substantially observed the rules of the institution or institutions to which he has been confined, and if the Commission, upon consideration of the nature and circumstances of the offense and the history and characteristics of the prisoner determines:*

*(1) That release would not depreciate the seriousness of his offense or promote disrespect for the law; and*

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a viable basis, when considered together, judgments required by this

"It is the intent of the Conference that the Parole Commission, in making each parole, shall recognize and make a determination as to the relative severity of the prospective offense and that in so doing shall be guided by the public perception of their respective gravity. It is the view of the Conference that the United States Parole Commission is joined with the courts, the Congress and the other Federal agencies in an effort to instill respect for the Parole Commission efforts in the public mind. The Parole Commission efforts in this regard shall be manifested in the determinations which result in the release of only those who meet the criteria.

"Determinations of just punishment are not easily made in the parole process, and these determinations are easily made because they require a sense of justice. There is no body of empirical knowledge upon which parole makers can rely, yet it is important that the parole process to achieve an aura of fairness in the determinations of just punishment.

(1976); H. R. Conf. Rep. No. 94-838, supra, 25-  
(1976).<sup>16</sup>

overnment asserts that, "In enacting the Parole  
ion and Reorganization Act, which endorsed the  
ion's use of the guideline and required continued  
hat device, Congress emphasized that the stand-  
release on parole were not being changed from  
law." (GB 58-59). One need only to examine with  
citations set forth by the government in support  
proposition to conclude that the opposite of the  
ent's contention is true. The government's cita-  
l particularly those appearing and quoted in Foot-  
(GB 59) are not directed at the Parole Commis-  
Reorganization Act as passed and signed into  
rather were directed to H.R. 5727, the House of  
tatives ancestor of the PCRA. The relevant

her Congress was wise in inserting these considerations  
for parole decisionmaking is not relevant to the question  
by this case. That these were new considerations applied  
the Parole Commission in its pilot project in 1972 and then  
l in 1976 by the PCRA is, however, clear. "The guide-  
thus represents two major departures in previous parole  
decisionmaking. It establishes explicit criteria which, in  
determine the parole release date. And in its choice of

Finding that the new guidelines had frustrated the intentions and expectations of the sentencing judge at the time of imposition of sentence, the court held that Title 28 U.S.C. §2255 provided an appropriate vehicle for granting relief.

In denying rehearing, the Third Circuit made the limitations of its *Salerno* ruling clear; stating:

"Our holding is narrow and does not vest sentencing courts, as alleged by petitioner, 'with power of a super parole board'. Our decision does, however, 'permit the district court to correct a sentencing error where the import of the judge's sentence has in fact been changed by guidelines adopted by the Parole Board . . . subsequent to the imposition of that sentence.' *United States v. White*, 540 F. 2d 409, at 411 (8th Cir. 1976)"<sup>19</sup>

We suggest that the court could have as correctly stated: "While our holding does not vest sentencing courts 'with the power of a super parole board', the

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<sup>19</sup> Concerned about the impact of its ruling on judicial time the Court made the following observation in the original *Salerno* opin-

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upon institutional record and attitude—the principal criterion in parole decisions. The Parole Board's independent review of the inmate's crime took on primary importance. In Addonizio's case, it was the Parole Board's evaluation of the severity of the offense which led to the denials of parole even though he had served more time than indicated by the guidelines.

The expectations and intentions of the sentencing court at the time of sentencing, the basis for sentencing, and the manner in which the changes in parole decisionmaking changed the court's intentions cannot be better stated than in the language of the court in its opinion granting Mr. Addonizio parole:

"At the time sentence was imposed, the trial court expected that petitioner would appear before a parole hearing—that is, a court hearing to determine his institutional record and his potential for recidivism—upon the completion of his sentence. The Court anticipated that he would receive appropriate institutional adjustment and behavior while confined—that he would be held in confinement for a period of time before being released.

1976); Parole Commission and Reorganization Act, Pub. L. No. 94-233, 90 Stat. 219 (1976) [codified in 18 U.S.C. §4201 et seq. (Supp. 1977)]. For example, in addition to consideration of the institutional record and the probability of recidivism, there now seems to be a very much heightened emphasis on 'the nature and circumstances of the offense.' See, e.g. 28 C.F.R. §2.18 (1976). Compare 28 C.F.R. §2.2 (1971); note 3 supra.

It is clear that this new emphasis has had a substantial adverse impact on the petitioner's eligibility for parole. He has now served more than one-half of his ten-year sentence and has twice been denied parole, despite his excellent institutional record and a very low likelihood of recidivism. Both denials were predicated primarily on the nature and circumstances of the petitioner's offense. See *United States ex rel. Addonizio v. Arnold*, 423 F. Supp. 189, 190 n.4 (M.D. Pa. 1976); Supplemental Brief for Petitioner, Exhibit A.

Thus, it is obvious that the petitioner has not received the type of meaningful parole hearing contemplated by the Court at the time of sentencing. The Court's decision in this case, therefore,

parole standards and procedures,  
the frustration of this Court's sen-  
tions and intent." (78-176 Pet. App.

istics cited in support of the proposition [ ] prisoners were not released until well beyond their maximum sentence" (GB 55-56) are both inaccurate on the point sought to be advanced by the appellants. It must be remembered that these statistics are based on a study conducted of parole decisionmaking by the research staff of the National Commission on Crime and Consequence. At the time of Addonizio's study, no information was available to the Parole Board, let alone to the general public, concerning the entire federal prison population or the proportion of original sentence (inmates with the highest proportion of their sentence before release) which take no account of the fact that even inmates who receive one-third point hearings are likely to be granted parole before the exact one-third point because of the parole board's discretion and most importantly, they contradict the statistics previously published by the Parole Board. In virtual precision what the sentencing court has in mind in standing of the effect of the sentence

The rule of the Third Circuit remains as set forth in the second *Salerno* opinion and permits "the district court to correct a sentencing error where the import of the judge's sentence has in fact been changed by guidelines adopted by the Parole Board . . . subsequent to the imposition of that sentence"<sup>23</sup> as may be modified only by the greater understanding the Third Circuit has acquired since the *Salerno* case of the extent of the change actually effectuated in parole decisionmaking criteria and procedures.<sup>24</sup>

Since the *Salerno* and *Addonizio* decisions, the Third Circuit has thoroughly analyzed the fundamental change in parole philosophy and criteria applied in parole decisionmaking. *Geraghty v. U. S. Parole Commission*, 579 F. 2d 238 (1978), petition for cert. pending No. 78-572. We submit that the principle of the Third Circuit §2255 cases applies only in the event of such a fundamental change in policy; which change in policy in turn changes the import of the sentence to the detriment of the defendant. We further submit that it is fair to say that in the 69 years since the federal government has had parole legislation, the change which gave rise to the Third Circuit cases is the first and only such fundamental change in philosophy and criteria of federal parole decisionmaking. Cf. 121 Cong.

Rec. 15701 (1975); see, generally, Project, *Parole Release Decisionmaking and the Sentencing Process*, supra.<sup>25</sup>

**D. Based upon the change in parole decisionmaking criteria and its effect on the Addonizio sentence, §2255 relief was appropriate.**

The scope of §2255 relief is identical to that of habeas corpus. *Davis v. U. S.*, 417 U.S. 333, 343 (1974); *Hill v. U. S.*, 368 U.S. 424 (1962); *U. S. v. Hayman*, 342 U.S. 205 (1952). We respectfully submit that the Ninth Circuit in *Andrino v. U. S. Board of Parole*, 550 F. 2d 519 (1977) was in error in denying §2255 relief on the ground that §2241 provided the appropriate remedy.

We respectfully submit that other circuits declining to exercise §2255 jurisdiction in circumstances similar to those presented by the Addonizio case did so from a lack of full understanding of the nature and scope of the changes which took place. The concerns expressed by the First, Second and Sixth Circuits that a decision finding §2255 jurisdiction would mean authority to vacate and re-

sentence each time well founded.<sup>26</sup>

The change which Mr. Addonizio's moving philosophy; quite revisions in the guidelines. It is the type of fact pattern in the near future.

It created a situation of circumstances which *Lewis*<sup>27</sup> and the Supreme Court grant §2255 relief.

The nature of the changes of certain pre 1974 laws to address other than §2255 issues purposefully set a hard limit on the use of parole power. The statute was designed to make clear that the understanding of parole was that it would be spent in the full intention of the criminal record, reducing the one-third point. This is not to say that the extreme formulation of the "re-

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<sup>25</sup> This is not to say that the extreme formulation of the "re-

sentencing Judge in imposing sentence was enhanced by the removal of any real claim defendant to obtain release, as originally indicated, only that he maintained a good institutional record and demonstrated that he was not a risk.

The significance of assumptions as to the parole both to the court in setting sentence and to the individual inmate can hardly be denied generally, *Warden v. Marrero*, 417 U.S. 653 (

While *Marrero* talks in terms of parole, it must be realized that parole eligibility had a distinctly different meaning than *Donizio* was considered for parole. While the ultimate release decision, whether in 1972-73, was and remains committed to the parole authorities, there is today a different philosophy and set of criteria controlling that discretion than was the case in 1970.

The simple operative truth is that in 1968 parole eligibility would have been determined by criteria that, given his character and background, the only reasonable expectation was release at the point of sentence. The change in parole criteria meant parole would not be granted.